IN THE HIGH COURT OF SIKKIM

REGULAR FIRST APPEAL NO.3 OF 2003

Bishnu Kumar Rai,
son of late G. B. Rai,
resident of Sichey Busty,
P.O. Gangtok,
East Sikkim. ... . **Appellant/**
Defendant No.1.

VERSUS

1. Minor Mahendra Bir Lama,

2. Minor Shoundarya Bir Lama,
both sons of Sri Basant Bir Lama,
through their mother and
guardian Anjita Lama.
wife of Sri Basant Bir Lama,
resident of Nazitam Patim,
P.O. Nazitam, Martam,
East Sikkim. ... . **Principal Respondents/**
Plaintiffs.

3. Sri Basant Bir Lama,
son of Late Ran Bahadur Lama,
resident of Gangtok,
Sichey Busty,
P.O. Gangtok,
East Sikkim. ... . **Proforma Respondent/**
Defendant No.2.

For the Appellant/Defendant No.1. :	Mr. S. R. Sarkar assisted by Mr. K. T. Bhutia, Advocates.
For the Principal Respondents: /Plaintiffs.	Mr. A. Moulik, Senior Advocate assisted by Mr. N. G. Sherpa, Advocate.
For the Proforma Respondent/: Defendant No.2.	Mr. J. K. Chandak, Advocate.

PRESENT : THE HON'BLE SHRI JUSTICE N. S.SINGH, CHIEF JUSTICE (ACTING).
THE HON'BLE SHRI JUSTICE A. P. SUBBA, JUDGE.

Date of Judgment: 18th July, 2005.

JUDGMENT

SINGH, C.J. (ACTG.),

The Judgment and Decree passed by the learned District Judge, South and West at Namchi, South Sikkim in Civil Suit No.13 of 2002 is the subject matter under challenge in this Appeal.

2. The facts of the case, in a short compass, are as follows: -

The two minor plaintiffs, namely, Mahendra Bir Lama and Shoundarya Bir Lama represented by their mother and legal guardian Smt. Anjita Lama, the principal respondents herein, instituted a suit being Civil Suit No.8 of 2000 before the Court below for the following reliefs: -

" (a) A decree declaring the right, title and interest of the plaintiffs over the schedule "B" property/suit land;

(b) Declaration to the effect that the defendant No:1 has no right, title and interest over the suit property;

(c) A decree to the effect that the defendant No:2 had or has no right to sell the property mentioned in schedule "B" as the plaintiffs are the joint owners of the said property;

(d) A decree restraining the defendant No:1 from using the suit property in any manner whatsoever;

(e) A decree for recovery of possession of the suit land in favour of the plaintiffs;

(f) a decree of cost of the suit;

(g) Any other relief or reliefs to which the plaintiffs are entitled in law and also in equity. ";

by contending, inter alia, that the plaintiffs and defendant No.2, namely, Shri Basant Bir Lama, the proforma respondent herein, are Hindus and are governed by Mitakshara School of Hindu Law and the plaintiffs' father Shri Basant Bir Lama, the proforma respondent herein, had purchased a plot of lands at Sukhapool, East Sikkim out of the nucleus of the ancestral properties acquired by him from his ancestors and that the plaintiffs have equal right over the said property described in Schedule 'A' of the plaint as coparceners along with their father defendant No.2 (proforma respondent herein), but the defendant No.2 (proforma respondent herein), in collusion with the defendant No.1 (the appellant Shri Bishnu Kumar Rai herein) sold a portion of the said land to the appellant and the land so far sold to the appellant is described in Schedule 'B' of the plaint (hereinafter referred to as the suit land). According to plaintiffs, the defendant No.2, i.e. their father had/has no right to alienate the suit land to anyone else including the defendant No.1 and apart from that such alienation of the suit land by the defendant No.2, (the present appellant herein) was not for any legal necessity. It is also the case of the plaintiffs that though they are minors, they are coparceners with their father defendant No.2 (proforma respondent herein) with respect to the ancestral properties including the suit land described in Schedule 'B' of the plaint and accordingly, they have sought for the reliefs mentioned above before the trial Court. The suit was subsequently transferred to

the file of the Ld. District Judge, South and West at Namchi, Sikkim and there it was renumbered as Civil Suit No. 13 of 2002.

3. The learned trial Court decided the case after recording the statement of the witnesses produced by the parties and after perusal of evidence on record, thus decreeing the suit and declaring that the plaintiffs have got their right, title and interest over the suit land and defendant No.2 (proforma respondent – father) had/has no right to sell the suit property and also that the appellant/defendant No.1 has no right, title and interest over the suit land and as such, the plaintiffs, the principal respondents herein, are entitled the decree for recovery of possession of the suit land i.e. two plots of land measuring 100' x 12' and 60' x 6' (in total 1560 sq.ft.) of the land situated at Sichey Block Gangtok bearing Khasra No.631/1147 (earlier it was 631) Khatian No.256 recorded in the name of the defendant No.2, out of the properties described in Schedule 'A' of the plaint with the boundaries described in the schedule of the plaint.

4. Being aggrieved by the impugned judgment and decree passed by the learned Court below, the defendant No.1 Shri Bishnu Kumar Rai, the appellant herein, preferred the present appeal and the appellant questioned the validity of the impugned judgment and decree, with the following grounds: -

(a) The Mitakshara School of Hindu Law has no application in Sikkim or in respect of Sikkimese Buddhists and the learned Court below has decided wrongly and incorrectly that the plaintiffs were governed by Mitakshara School of Hindu Law and the learned Court below has come to the said conclusion relying on the vague and indefinite pleadings of the plaintiffs without any evidence and that the learned Court below is wrong in holding and deciding that the suit property was ancestral property in the hands of the Proforma respondent, the father of the Principal respondents.

(b) The learned Court below ought to have held that the so called document of Partition (Exhibit P-1) was false and fabricated one prepared for the purpose of the suit and it was also wrong on the part of the learned Court below in holding that Rs.78,000/- (Rupees seventy eight thousand) only which was admittedly paid by the appellant to the father of the plaintiffs was not utilized for legal necessity and/or for benefit of the family of the plaintiffs.

(c) The learned Court below erred in law in holding that the land described in Schedule 'A' of the plaint is a coparcenary property and that the father of the plaintiffs had no right to alienate the same.

(d) The learned Court below has erred in law and on facts in not holding that the land described in Schedule 'A' of the plaint and the suit land is the self-acquired property of the father of the plaintiffs and he has/had every right to sell and dispose of the said property.

(e) For that the findings of the learned Court below is not based on evidence on record and that the suit was a

collusive and fraudulent one as the father of the plaintiffs has been made one of the defendants in the suit only to stab the appellant from behind.

(f) For that the learned Court below is wrong in its finding that Section 53-A of the Transfer of Property Act had no application in the transaction of sale of the suit land by the father of the plaintiffs to the appellant herein and apart from it, the learned Court below ought to have held that the suit property is the self-acquired property of the father of the plaintiffs, i.e. the defendant No.2 (proforma respondent herein) and the suit was filed in collusion with the wife of the defendant No.2 and at the instance of Shri G. P. Sharma who is backing and helping the plaintiffs and their father anyhow to negate the sale of the suit property to the appellant for their personal gain.

5. Mr. S. R. Sarkar assisted by Mr. K. T. Bhutia, learned counsel for the appellant, while arguing the case for and on behalf of the appellant, supported rather gave emphasis upon the grounds taken in the memo of appeal as highlighted above and contended that the minor plaintiffs were not born at the time of the transfer of the suit land by the defendant No.2 in favour of the defendant No.1, the appellant herein and as such, the plaintiffs have no right, title or interest over the suit land. It is also contended by the learned counsel for the appellant that the Court below ought to have impounded the document Exhibit D-1 and directed the appropriate authority to cause the registration of Exhibit D-1 by imposing penalty to the extent of

50 times of the usual registration fee in terms of the Sikkim State General Department's Notification No.385/G dated 11th April 1928 and Notification No.2947/G dated 22nd November 1946 and such document may be validated and admitted in the Court to prove the title of the appellant (defendant No.1) over the suit land. Apart from it, the learned counsel went on to contend that the provision of Section 53-A of the Transfer of Property Act has its application in the present transaction of the sale of the suit land by the father (defendant No.2) of the plaintiffs to the appellant and the Schedule 'A' land is the self-acquired property of the father of the plaintiffs and that being the position, the plaintiffs cannot now challenge or question the right, title or interest of the appellant over the suit land.

6. At the hearing, Mr. A. Moulik, learned senior counsel assisted by Mr. N. G. Sherpa, learned counsel argued that there is no infirmity or illegality in the impugned judgment and decree as the learned Court below rightly passed the impugned judgment and decree on the basis of the available materials on record. Mr. J. K. Chandak, learned counsel for the respondent No.3 (defendant No.2) in his usual frankness contended that the necessary order may be passed from the ends of this Court on the basis of available materials on record.

7. Now, this Court is to see and examine as to whether the impugned judgment and decree suffer from illegality or infirmity

and whether the appellant (defendant No.1) could make out a case to justify the interference with the impugned judgment and decree or not?

8. For just determination of real points in controversy between the parties the learned Court below framed the related issues which are quoted below: -

> " 1. whether the plaintiffs have their right, title and interest over the suit property?
>
> 2. whether the defendant No.1 has acquired any right at all over the schedule 'B' property, by virtue of purchase from the defendant No.2?
>
> 3. whether the defendant No.2 had any right to sell the property mentioned in Schedule 'B' and whether the plaintiffs are entitled to reclaim the same?
>
> 4. whether the instant suit is collusive one between the plaintiffs and the defendant No.2?
>
> 5. whether the suit of the plaintiffs is barred by principles of waiver, estoppels, acquiescence and law of limitation?
>
> 6. whether the plaintiffs are the joint owners of the suit property?
>
> 7. whether the sale of the suit land was for any legal necessity for the construction of R.C.C. building at Sukhapool, Sichey Busty?
>
> 8. whether the plaintiffs are entitled to any relief/reliefs? "

9. According to us, the findings of the learned trial Court on the related issues are based on reliable and sufficient evidence on record. While deciding the related issue Nos.1 and 6, the learned trial Court gave a reasoned finding on those related issues and for better appreciation in the matter the relevant observations so far made by the trial Court in the impugned judgment is reproduced as hereunder: -

" I have perused the deed in question, which is marked as exhibit P-2. The said document clearly goes to show that it is a Sale Deed document. No where it is mentioned in the said document that it is a Gift Deed. The document itself has been described as 'Sale Deed Document' and the consideration value has also been shown. The names of the alienator and alienee have been described as the Seller and the Purchaser and not as Doner and Donee. Hence is presence of clear language found in the registered instrument like exhibit P-2, it is very difficult to agree with the contention of the learned counsel for the defendant No.1 to hold that exhibit P-2 is a gift deed.

Now, the next point to be considered is as to how the said property was purchased. Was it purchased with the self-acquired fund of the defendant No.2? Or the same was purchased from out of the nucleus of the ancestral property of the plaintiffs and the defendant No.2. It is the case of the plaintiffs that the Schedule 'A' property was purchased from the funds derived from the ancestral property of the parties. The mother of the plaintiffs as PW-1 stated on this point....."the suit land is located at Sukha Pool Sichey Busty, Gangtok. The suit property was purchased by my husband with the money he got after selling out the gold (objected to) which he received as his share from his father Ran Bahadur Lama in family partition.....". The stand of the plaintiffs on this point has been corroborated by the defendant No.2 in his written statement as well as in his deposition before the Court. He deposed..... "The schedule 'A' land was initially purchased by me from one Tsewang Dorji Lama in the year 1978 vide a registered sale deed marked exhibit P-2 (already marked). The said land is measuring about 100 feet x 100 feet. The consideration value of the said suit land was Rs.500/-. In the year 1973 there was a partition of ancestral properties (movable and immovable). As a result of the said partition I got 2 tolas of gold and some silver ornaments vide partition deed exhibit P-1.....". The stand of the defendant No.1, on the other hand, does not seem to be consistent. This can be found when the mother of the plaintiffs was cross-examined by his learned counsel. At one point, a suggestion was put to her that the Schedule 'A' land was a gift without consideration. Whereas at another point, suggestion was made to her that the consideration value of Rs.500/- was paid by the defendant No.1 from his own pocket. Interestingly in his cross-examination the defendant No.1 has clearly admitted and stated ..... "It is true that the land described in the Schedule 'A' of the plaint was validly purchased by the defendant No.2 from one Shri C.D. Lama.....". Hence I hold that the plaintiffs have been able to prove that the suit land was purchased by their father out of the fund received by him from the sale proceeds of the ancestral properties. Thus they are also the co-owners of the suit property along with the defendant No.2. It is also proved by the plaintiffs that the Schedule 'A' land was purchased from the said Shri C. D. Lama and not an endowed one. This fact amply finds supports from the registered document exhibit P-2. Hence I hold that the plaintiffs have the right, title and interest over

the suit property and that they are joint owners of the suit property along with the defendant No.2. "

10. While deciding the related issue Nos.3 and 7, the learned trial Court observed that document Exhibit D-1 does not say anything about legal necessity nor does it show any bonafide circumstance that necessitated the defendant No.2 to sell the suit land and it was also further observed that the recitals in the deed of legal necessity do not by themselves prove legal necessity, and that being the position the defendant No.2 had no right to sell the suit property without any legal necessity which is a joint family property and that the plaintiffs are entitled to reclaim the same. So far the related issue No.2 is concerned, the trial Judge was of the view that without registration of the Sale Deed the title of the land would not pass to the defendant No.1, i.e. the appellant herein and the entire transaction would be invalid. The alternative plea or argument of the learned counsel for the appellant before the Court below is that Section 53-A of the Transfer of Property Act would come to rescue his client which was also turned down by the Court below, thus holding that defendant No.1, the appellant herein has not acquired any right over the Schedule 'B' property by virtue of purchase as alleged by the defendant No.1. So far the other related issue Nos.4 and 5, we are of the view that the trial Judge dealt with the matter exhaustively and gave reasoned findings on the basis of the available materials on record.

11. Now, it is seen and proved that the plaintiffs and defendant No.2 are governed by Mitakshara School of Hindu Law and accordingly, the plaintiffs have got right, title and interest over the Schedule 'A' land of the plaint. The defendant No.1, appellant herein, while contesting the suit by filing written statement, did not make specific denial of the facts that the plaintiffs and defendant No.2 are governed by the Mitakshara School of Hindu Law.

It is well established principle of law that, as under the Mitakshara Law, so under the Dayabhaga Law, coparcenary property may consist of ancestral property or of joint acquisitions, or of property thrown into the common stock, and accretions to such property. The essence of a coparcenary under the Mitakshara Law is unity of ownership and on the other hand, essence of coparcenary under Dayabhaga Law is unity of possession. It is not unity of ownership at all. The ownership of the coparcenary property is not in the whole body of coparcenars. Every coparcener takes a defined share in the property, and he is owner of that share. That share is defined immediately when inheritance falls in. It does not fluctuate with births and death in the family. In the case in hand, as the plaintiffs and the defendant no. 2 are governed by Mitakshara Law, each of them has a right to defined share in the property in schedule 'A' including the suit property in schedule 'B'.

Now, it is essential to examine more in depth about the document Exhibit D-1. For better appreciation in the matter, the contents of the document Exhibit D-1 are reproduced as hereunder: -

> " Money receipt
>
> Received a Cash of Rs.78,000/- (Rupees seventy eight thousand) only on a/c of consider nature of the land measuring 100' x 12' situated along and attached to the land of Mr. Govind Sharma, and other measuring 60' x 6' situated attached to the land of Sri B. K. Rai totaling to 1560 sft. Sold out to Sri B. K. Rai, S/o. G. B. Rai, Sichey Busty @ Rs.50/- per sft. By me. The land sold is covered by plot no.631 owned by the undersigned.
>
> Sd/-
> Basant Bir Lama,
> Sichey Busty,
> Gangtok. "

This document Exhibit D-1 is a Money Receipt on the face of it without revenue stamp/fee and also not a registered document and without bearing the date of the execution or writing of such document on it. According to us, it is difficult to treat this document Exbt.-D1 as an Agreement for Sale or Deed of Sale. From the original patta/parcha khatian it is seen that the land under Khatian No.256 covered by Khasra No.631/1147, measuring 0.23 acre stands in the name of the defendant No.2, Shri Basant Bir Lama, which is the land described in Schedule 'A' to the plaint.

12. As discussed above, except this document in the form of Money Receipt there are no documents like Sale Deed or Agreement for Sale. We are of the view that this document Exhibit D-1 does not amount to sale "In terms of Section 54 of

the Transfer of Property Act" and such document is not a registered instrument. It is not a valid Sale Deed in the eye of law and apart from that the proper identity of the land, in question under the said Money Receipt is vague as discussed above. We further hold that as the defendant No. 2 and defendant No. 1 lost the sight of their rights and the liabilities of a buyer and seller in terms of Section 55 of the Transfer of Property Act, 1882, the document marked Exbt.-D1 could not be termed as Sale Deed under the law and therefore, the question of time of birth of the minor plaintiffs before the alleged transaction has no relevancy in the case in hand. It is also well settled that the benefit of doctrine of part performance is not available in the absence of a valid document from which the Court can ascertain the terms of the document with reasonable certainty. In the case in hand, such document marked Exhibit D-1 is not a document for enforcement of the part performance as it was not drawn in accordance with law as highlighted above. In view of the above position, we are not inclined to accept the contention of the learned counsel for the appellant that the document Exhibit D-1 is a Sale Deed and the same is proved when there is inconsistent pleadings of the appellant that the document Exhibit D-1 is a Sale Deed on one hand and again, the defendant No.1, the appellant herein is protected by Section 53-A of the Transfer of Property Act on the other hand and, further it was pleaded that no sale deed was executed as the

land was purchased for construction of motorable road to be used by the people of the locality including the defendant No. 2 and it was believed that after construction of the road there will be no dispute regarding title.

13. So far the contention of the learned counsel appearing for the appellant that the Court below ought to have impounded the document D-1 and directed the proper authority to validate the same and register it on payment of penalty though this plea was not taken before the trial Court, it is necessary for this Court to examine this contention for which the related two notifications dated 11th April, 1928 and 22nd November 1946 are quoted below: -

"

Sikkim State
General Department

Notification No. 385/G dated 11th April, 1928.

To

All Kaziz, Thekadar and Managers of Estates.

In connection of the previous Rules on the subject His Highness the Maharaja of Sikkim is pleased to order the Law of Registration applicable in the State shall be amended. Notifications No. 314 and 2283-36/G dated 23rd February, 1907 and 10th July, 1923 respectively shall be read and applied under:

(i) "Any document such as mortgage and Sale deeds, and other important deeds etc. will not be considered valid unless they are duly registered."

(ii) "The contents of an unregistered document (which ought in the opinion of the Court to have been registered) may be proved in Court but a penalty, upto fifty times the usual registration fees shall be charged."

Exception: "Hand Notes duly stamped shall be exempted from registration penalty-"

By order of His Highness the Maharaja of Sikkim,

Sd. Gyaltsen Kazi,
General Secretary to His Highness
The Maharaja of Sikkim "

"

SIKKIM STATE
GENERAL DEPARTMENT

Notification No. 2947/G dated the 22nd November, 1946

Amendment of para 2 of Notification No. 385/G dated the 11th April, 1928.

An unregistered document (which ought in the opinion of the Court to have been registered) may however be validated and admitted in Court to prove the title or other matters contained in the document on payment of penalty upto fifty times the usual registration fee.

Issues by order of His Highness the Maharaja of Sikkim.

Gangtok,
the 22nd November, 1946

T. Tshering
(Offg) General Secretary
to H.H. the Maharaja of
Sikkim. "

A bare perusal of these two notifications shows that, in the first part of the notification; any document such as mortgage and sale deeds etc. will not be considered as valid unless they are duly registered and the second part speaks about the validation and admission of an unregistered document for proving the title or other matters contained in the document on payment of penalty upto 50 times the usual registration fee which ought in the opinion of the Court to have been registered. In other words, the second part appears to be an enabling provision for registration of an unregistered document in case the Court is/was of the opinion that the said unregistered document ought

to have been registered. But, in the case in hand, we are of the view that this document Exhibit D-1 could not be validated or admitted in Court to prove the title or other matters contained in the document on payment of penalty as discussed above as such document could not be registered as sale deed even the appellant desires to avail the protection of his case by the said notifications dated 11th April 1928 and 22nd November 1946. According to us, such notifications cannot override the related statutory provisions of the Transfer of Property Act, 1882, and apart from it, we do not see any reason for causing registration of the alleged money receipt dated Nil, Exhibit D-1 document as Sale-deed.

It may be mentioned that the defendant No.1, the appellant herein, in his written statement specifically stated that no Sale Deed was executed as the suit land was purchased for the construction of motor-able road to be used by the people of the locality including the defendant No.2 and it was believed that after construction of the road there will be no dispute regarding title as seen in paragraph 11 of the written statement. This, according to us, such statement of the appellant, defendant No.1 virtually amounts to misleading statement leading to fraud on Court.

It is also noteworthy to mention that this Court appointed Shri D.K. Singh, Advocate as a Commissioner to find out and

locate the Schedule B property, i.e. the suit land said to have been purchased by the defendant No. 1, the appellant herein, from the defendant No. 2 and also the present position and status of the suit land. The Advocate Commissioner submitted his report on 20th November 2004 and in the said report it is stated that the purported sale between the defendant No. 2 and defendant No. 1 does not appear to be borne out from the records of the Land and Revenue Department to be registered and as per the records of the Land and Revenue Department, Schedule B property, i.e. the suit land stands recorded in the name of Shri Basant Bir Lama, i.e. the defendant No. 2 and not in the name of the present appellant (defendant No. 1). The report also confirms that the road constructed over the suit land leads upto the appellant's (defendant No.1's) building and the road constructed on Schedule B property measuring 100' x 12' is essentially a private road constructed by the appellant (defendant No. 1) and the same is a private road for his ingress and egress. The said Commissioner's report is marked as 'X' for identification. Be that as it may, according to us, no right, title or interest over the suit land i.e. Schedule B property was/is ever conferred upon the appellant-defendant No. 1 on the basis of the said money receipt, which according to the appellant is a sale deed or, agreement for sale, as highlighted above.

14. Be that as it may, we are of the view that the appellant could not make out a case to justify interference with the impugned judgment and decree as the learned trial Court had dealt with the related issues exhaustively and decided the same on its own merit on the available materials and evidences on record and gave the reasoned findings on all those related issues.

15. For the reasons, observations and discussions made above, we are of the view that the appellant, defendant No.1 could not make out a case to justify interference with the impugned judgment and decree. In the result, the appeal is devoid of merit and accordingly, it is dismissed thus confirming the impugned judgment and decree of the learned trial Court passed in Civil Suit No.13 of 2002 with a cost of Rs.10,000/- (Rupees Ten thousand) only which shall be paid by the appellant. It is made clear that 50% of the cost, i.e. Rs.5,000/- (Rupees five thousand) only shall be paid to the minor plaintiffs through their mother and legal guardian Smt. Anjita Lama and another Rs.5,000/- (Rupees five thousand) only shall be treated as part of the fund of the Bar Association of Sikkim for which the appellant shall deposit the same with the Registry of this Court within a period of 2 (two) weeks from today and after such deposit, the minor plaintiffs and Bar Association of Sikkim are at

liberty to withdraw the same after they are duly identified by a learned Lawyer of this Court.

16. Ad-interim order dated 16-06-2003 passed by this Court in this Appeal stands vacated.

17. Considering the nature of the case, we are constrained to make the following observation: -

Dismissal of this appeal shall not stand on the way of the appellant to file suit against the defendant No. 2 (proforma respondent herein) for recovery of the amount mentioned in the document marked Exhibit D-1, if so advised.

(N. S. SINGH)
CHIEF JUSTICE (ACTING)
18.07.2005

I agree.

(A.P. SUBBA)
JUDGE
18.07.2005